No. 71-[illegible]

In the Supreme Court of the United States

October Term, 1971

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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1. The appellee steel companies mischaracterize our treatment of the legislative history of the Esch Act, 49 U.S.C. 1 (14)(a). We do not contend, as appellees suggest (Brief for Allegheny-Ludlum Steel Corporation, et al., 15 (hereafter, "Steel Br.")), that the legislative history of the Act by itself "establishes" the reasonableness of the Commission's action in this case, but rather that, in adopting the "reasonable rules" standard of Section 1(14)(a), Congress specifically intended "to authorize the Commission to enforce, where appropriate, the existing car service rules volun-

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tarily adopted but frequently ignored by the railroad industry" (Govt. Br. 19). Our survey of the legislative history (Govt. Br. 18–23) fully supports the conclusion that Congress anticipated and sanctioned the enforcement of such rules in instances where the Commission determines, after hearing, that the public interest requires such enforcement.[1]

In attempting to discount the legislative history, the appellee steel companies stress (Steel Br. 16–17) the Senate's rejection of a provision which would have required the carriers to file the car service rules as part of their tariffs. But the deletion of this provision in no way negates the authority of the Commission to prescribe the rules; rather, it merely reflects the Senate's view that the determination of whether and when, these rules should be made mandatory should be a matter for the sound judgment and discretion of the Commission. Indeed, in presenting the report and amended bill of the Senate Committee on Interstate Commerce, Senator Pomerene stated that it was the purpose of the Senate amendments to "confer fuller authority upon the Interstate Commerce Commission." See 55 Cong. Rec. 2631.

The steel appellees also argue (Steel Br. 14–15) that the legislative history we rely on is "largely ir-

[1] The appellee steel companies correctly point out (Steel Br. 5, n. 5) that the testimony of one of the railroad witnesses relied on by us for the proposition that some railroads conceded that enforceable car service rules were needed (App. 194–195; cited at Govt. Br. 10) was stricken from the record (App. 337). Our error was inadvertent, and we no longer rely on that testimony. The stated proposition, however, is amply supported by the remaining citations on page 10 and in note 12 of our brief.

revelant" because much of it relates to the Esch bill as introduced in the House which would have granted the Commission only emergency authority to promulgate car service rules; not until later did the Senate amend the bill to provide for general authority to establish such rules. Not only does that argument not account for the legislative history subsequent to the Senate amendment (see Govt. Br. 23); it ignores the fact that the purpose of the Senate amendments was to confer greater—rather than less—authority upon the Commission. Plainly if, as we contend (Govt. Br. 19–22), the original Esch bill was directed to problems of car supply, its scope was not lessened by amendments designed to increase the breadth of the Commission's power.

2. The steel appellees now contend (Steel Br. 10–11; 17–18), in an argument not previously made, that the Commission's prescription of mandatory car-service rules is inconsistent with the policy of Section 1(21) of the Interstate Commerce Act, 49 U.S.C. 1(21), which provides that the Commission cannot require a railroad to acquire additional facilities without a finding that the expense involved will not impair the carrier's ability to perform its duty to the public. Even apart from the basic issue of whether the requirements of Section 1(21) are applicable to the acquisition of freight cars, however, the Commission's order here is not based on its powers under that Section and does not direct any railroad to acquire equipment; Section 1(21) is thus inapplicable.

Acknowledging that Section 1(21) may not be directly applicable here, the steel appellees suggest (Steel

Br. 17–18) that the Section establishes a general policy applicable throughout the Act requiring a finding of financial ability whenever a Commission action is intended to induce some carriers to acquire cars. Appellees, however, cite no evidence that Congress intended that the specific requirement in Section 1(21) for a finding of financial ability should be generally applicable throughout the Act. Over a period of years, the Commission has issued numerous orders designed to encourage the railroads' acquisition of additional equipment (such as, for example, the prescription of an increase in basic per diem [2] and the adding of an incentive element to the basic per diem charges [3]). Although such orders have a more direct effect upon equipment acquisition than do the mandatory car-service rules here at issue, no one has ever suggested that they must be predicated upon a Section 1(21) finding of financial ability.

3. The steel companies assert that mandatory observance of the car service rules will result in lessened competition among both shippers and carriers (Steel Br. 24–30). They argue with respect to shippers that "business firms that located their plants and designed their production and shipping facilities in reliance upon the railroad industry's practice of free access

[2] See *Union Pacific Railroad Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.); *Boston and Maine Railroad* v. *United States*, 257 F. Supp. 615 (D. Mass.), affirmed per curiam, 396 U.S. 27.

[3] See *Long Island Railroad Co. v. United States*, 318 F. Supp. 490 (E.D. N.Y.); *Florida East East Coast Ry. Co.* v. *United States*, 322 F. Supp. 725 (M.D. Fla.), appeal docketed, No. 70–279.

to and use of cars in the national freight car fleet will be arbitrarily deprived of reasonable access to rail transportation services if the lines on which they are located are among the car-poor carriers" (Steel Br. 24; footnote omitted). Ignored is the fact that whatever "practice of free access" existed previously was in direct derogation of the rail industry's long-standing Code of Car Service Rules (Govt. Br. 5). As the Commission found, violation of these rules frequently was the result of "special privileges" accorded favored shippers (J.S. App. 58–59). "Our purpose," the Commission declared, "is to induce the carriers to cooperate more fully among themselves and to provide some relief to the general shipping public which has not been receiving the same car service as a number of favored shippers" (J.S. App. 63). Mandatory compliance will have the salutary effect in many instances of removing discriminatory service practices based on shipper size and financial strength, thus permitting less advantaged shippers to bid competitively for available car service. Furthermore, as the Commission noted, even if some shippers must face car shortages as a result of the Commission's action, "the needs of shippers affected should not be met with equipment of carriers which obtained the cars to serve other shippers" (J.S. App. 66).

With respect to inter-carrier competition, the steel appellees argue (Steel Br. 25) that smaller carriers are able to compete effectively only because they have access to a general pool of cars and that the Commission's decision will eliminate such carriers' access to this car pool. The Commission's decision, however, does not

eliminate access to foreign freight cars, but only determines the conditions under which such cars may be used. The fact that competition between some carriers serving common shippers may be incidentally affected by reason of the relatively greater effect of these conditions on the carriers with low car ownership—a difference in effect which, of course, is the very objective of the rules—does not undermine the validity of the Commission's determination that, in the present circumstances, enforcement of the car service rules is appropriate to alleviate the chronic shortage of freight cars.

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed.

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MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972